

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC.,
Plaintiff,
v.
LAWSON SOFTWARE, INC.,
Defendant.

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: Civil Action
: No. 3:09CV620
:
: March 25, 2011
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COMPLETE TRANSCRIPT OF **EVIDENTIARY HEARING**
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

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Counsel for the defendant Lawson.

1 (The proceedings in this matter commenced at
2 9:30 a.m.)

3
4 THE CLERK: Civil Action No. 3:09CV620,
5 ePlus, Incorporated v. Lawson Software, Incorporated.

6 Mr. Scott L. Robertson, Mr. Craig T. Merritt,
7 Ms. Jennifer A. Albert, Mr. Michael G. Strapp
8 represent the plaintiff. Mr. Daniel W. McDonald,
9 Mr. Dabney J. Carr IV, Ms. Kirstin L. Stoll-DeBell,
10 Mr. William D. Schultz, and Ms. Rachel C. Huey
11 represent the defendant.

12 Are counsel ready to proceed?

13 MR. ROBERTSON: The plaintiff is, Your Honor.

14 MR. McDONALD: Lawson is as well, Your Honor.

15 THE COURT: All right. This is the
16 evidentiary hearing on the issue of an injunction.

17 Is there another firm coming into this case
18 for you-all?

19 MR. McDONALD: The Finnegan firm is involved,
20 Your Honor, but they are not going to be participating
21 in this hearing. They are going to be involved with
22 the appeal primarily, but they wanted to have access
23 to the documents.

24 THE COURT: Oh, okay.

25 Mr. Robertson.

1 MR. ROBERTSON: Good morning, Your Honor.

2 If I might, I just have a few brief opening
3 remarks to just sort of put some of the issues in
4 context and then preview for the Court or highlight
5 some of the topics that are going to be addressed
6 today by Mr. Farber's testimony, if that's
7 permissible.

8 THE COURT: All right.

9 MR. ROBERTSON: First, we are here to discuss
10 the supplemental evidence, testimony and documentation
11 that have been provided to the Court and exchanged by
12 the parties since the trial ended that we believe will
13 support the Court's discretion to grant an injunction
14 in this case to prevent the ongoing infringement of
15 ePlus' patents.

16 We certainly don't want to be here today, and
17 I know the Court doesn't want to retry the case, or
18 reargue a number of the issues involving hotly
19 contested issues that are before the Court.

20 That said, there will be some additional
21 details concerning evidence that did come out that we
22 think would be important for the Court to consider.

23 I'd just like to highlight Section 154 of the
24 Patent Act. Your Honor, the only right conferred upon
25 a patent owner under the Patent Statute is the right

1 to exclude. And that is the right that we are here to
2 enforce today as the Court knows.

3 The Patent Act was what's called a carefully
4 crafted bargain by Congress which provided a limited
5 right to exclude for a period of years in exchange for
6 disclosure to the world of the invention.

7 As you know, the eBay case has indicated and
8 confirmed that the Court has substantial discretion in
9 granting an injunction. And if we could just put up
10 the factors for the eBay test.

11 This four-factor test, which has been called
12 the eBay factors, are, of course, as the Court
13 recognizes, the traditional factors for a court
14 entering injunctive relief.

15 Irreparable injury and adequate remedy at law
16 have often been called the two sides of the same coin.
17 Balancing of the harms, of course, needs to be
18 considered as well as the public interest. But even
19 in the eBay case, an issue that arose was whether or
20 not a case called *Continental Paper Bag*, a 100-year
21 old decision, which had held that a patent owner, even
22 a non-practicing patent owner, had the right to
23 exclude an infringer from the marketplace.

24 And the Court considered that case and
25 whether or not it actually had to reverse that

1 decision. And it found that it did not. And I think
2 there's some interesting wording in that case that I'd
3 like to bring to the Court's attention.

4 It said from that right to exclude, the only
5 right granted to the patent owner, we may judge the
6 patent owner's remedies. Nothing less than an
7 injunction can retain that right of exclusivity
8 granted by the patent.

9 As Justice Roberts noted in his concurrence
10 in the eBay case, citing Justice Holmes, a page of
11 history is worth a volume of logic. Infringement
12 having been found, the traditional remedy is to enter
13 the injunction.

14 Those are my opening arguments.

15 THE COURT: It's been interpreted to mean
16 there's a presumption of entitlement to injunctive
17 relief as opposed to an absolute entitlement to
18 injunctive relief; is that your point?

19 MR. ROBERTSON: I think the issue is still
20 open as to whether or not the presumption still
21 applies. I think certainly in instances where there
22 has been established proven competition,
23 overwhelmingly courts have entered the injunctions in
24 favor of the patent owner, infringement having been
25 found.

1 But even competition itself, Your Honor, is
2 not critical to the injunctive relief we're seeking
3 here. We think the parties have focused significantly
4 in their posttrial submissions on this issue of
5 competition, and there will be a lot of discussion
6 about that today.

7 But even the Federal Circuit post eBay has
8 said, for example, you're not required to prove actual
9 lost sales in order to obtain an injunction. You're
10 not even required to show that you have a commercial
11 product that's marketed in direct competition.

12 Those cases I can cite to the Court are *Eye*
13 *For Eye, Limited*. The citation is 598 F.3d 831. It's
14 a 2010 case. And Broadcom v. Qualcomm, which is 543
15 F.3d 683. Obviously, we'll be citing those in our
16 posttrial brief, Your Honor. But, nevertheless, we
17 believe at the end of this hearing the evidence will
18 be overwhelming that there's direct competition in the
19 same marketplace, in the same market sectors,
20 involving Lawson and ePlus for these procurement
21 software solutions.

22 So, first, I think it is important to
23 emphasis to the Court that ePlus does practice its own
24 patents. It's not what is known has an NPE, as it's
25 come up, or a non-practicing entity, or the more

1 disparaging term, a patent troll.

2 Mr. Farber is going to address the importance
3 of the products that ePlus sells in this marketplace.
4 The Court may recall they are called Procure+ and
5 Content+, and how they embody the patents-in-suit.

6 He's going to describe the ongoing role of
7 those software solutions for the company, how ePlus
8 has generated tens of millions of dollars in revenues
9 from licensing not only those products, but by
10 leveraging the sale of other related products for
11 those Content+ and ePlus.

12 He's going to explain how those products help
13 support and retain customers for its other business
14 and distinguish itself from its competitors in the
15 marketplace.

16 We are also going to have Mr. Farber address
17 issues about how ePlus markets those products and
18 solicits its customers, about the process and the
19 context and the significant overlap that it has with
20 the same way that Lawson solicits and targets its new
21 potential customers using a variety of means to obtain
22 leads and contact potential customers. He's going to
23 describe ePlus' sales and marketing efforts in that
24 manner.

25 And Your Honor may also recall that in this

1 process of solicitation of new companies, there is the
2 submission of what were called RFPs or requests for
3 proposals and the secretive nature of that bidding
4 process, which often makes it difficult to really
5 understand who you're competing with when you go
6 through that process. But since the trial terminated,
7 the parties have changed lists of their customers,
8 lists of the customers they solicited, and in the
9 submissions we provided to Your Honor, we have three
10 appendices, A, B. and C, in which we show the
11 substantial overlap there is with the solicitation of
12 the same customers, the customers that we've actually
13 solicited of Lawson's, and the customers that ePlus
14 has that Lawson has actually solicited as well.

15 Mr. Farber will also describe how both Lawson
16 and ePlus not only both target mid market sized
17 companies, so we're in that same market sector, but
18 also how we focus on many of the same industries,
19 including the education, energy, food and beverage,
20 government, health care, manufacture, retail and
21 transportation.

22 He'll then describe his own personal
23 knowledge of instances where ePlus and Lawson have
24 targeted the same customers and where Lawson has
25 targeted ePlus' customers.

1 He'll also address what we believe is the
2 ongoing irreparable harm to ePlus. Obviously, I've
3 emphasized the fundamental right is the right to
4 exclude, and that is a right that we would like to
5 retain since it's the only right granted to us by the
6 Patent Act.

7 He will describe how Lawson continues to
8 compete in the marketplace with its infringing systems
9 currently, the lost opportunities that ePlus has,
10 first, to try and market and sell to Lawson's
11 customers that are using the infringing systems, the
12 lost opportunities that we've suffered as a result of
13 the capital that's been diverted from this case that
14 could have been used for other efforts, sales efforts,
15 research and development, and opportunities to grow
16 our business.

17 He'll also discuss the result of Lawson's
18 infringement including the opportunity to sell its
19 products, as I said, to Lawson's customers.

20 Finally, if necessary, Mr. Farber is prepared
21 to discuss the licensing of ePlus' patents to other
22 infringers that we needed to bring enforcement actions
23 against, and how those licenses were carefully
24 circumscribed and restricted to make certain that they
25 were not sub-licensable, nonassignable,

1 nontransferable.

2 And, indeed, at least two of the licenses
3 that were a result of the litigation involved here,
4 ePlus and Mr. Farber negotiated what are called
5 carve-out provisions that specifically made certain
6 that those licenses granted to two of the other
7 defendants in this case that resolved their dispute
8 with ePlus could not be transferred to Lawson in
9 particular.

10 Finally, briefly, Mr. Farber may discuss
11 ePlus' capability to replace Lawson's procurement
12 solution in the marketplace.

13 So with that, Your Honor, those are my
14 concluding opening remarks. Unless the Court has any
15 questions, I would call Mr. Farber.

16 MR. McDONALD: Your Honor, Mr. Robertson and
17 I talked about whether you might give both of our
18 openings at the beginning. We didn't talk about it
19 again this morning. If you want me to wait, that's
20 fine, but if you want, I can help tee it up and give
21 you five minutes of our version of it right now.

22 MR. ROBERTSON: I'm happy either way.

23 THE COURT: What do you want to do? Do you
24 want to wait or do you want to talk now?

25 MR. McDONALD: I'd like to give you about

1 five minutes right now, if it's all right.

2 THE COURT: All right.

3 MR. McDONALD: Thank you. We certainly agree
4 on those four factors. In fact, if you want to leave
5 those up on the screen, that's fine with me. The four
6 factors after the eBay case. And I do think on the
7 issue of the presumption, when that case was remanded,
8 I was just looking at the remanded version of the
9 case, and in that decision the district court here in
10 Virginia said the presumption of irreparable harm does
11 not apply in patent cases, and you don't have that
12 presumption anymore. It's just like any other case.
13 The burden is on the party seeking the injunction to
14 show these factors are met.

15 And a number of things won't be hit in the
16 hearing today. We don't have to because they can be
17 on the papers or in terms of what was done previously
18 at trial.

19 I'll just note very briefly on the
20 availability of a remedy alternative to injunction,
21 there is the availability of a going forward royalty.
22 In post eBay, you see a number of cases doing that.
23 The Federal Circuit has weighed in on the Toyota Pace
24 case to say it's not a jury issue. This is an issue
25 for the Judge to decide going forward.

1 And so what happened at trial, the ePlus
2 folks didn't mention this, obviously. They haven't
3 talked about a royalty as being an alternative. And I
4 think they want it both ways because damages was
5 excluded as a sanction at the trial of this case.
6 They are going to appeal that issue and try to get
7 damages back in the case.

8 I think that's the elephant in the room from
9 their standpoint. Why isn't a royalty going toward
10 directed to the RSS and Punchout products an adequate
11 remedy? And they didn't touch that in their first few
12 minutes here, and it's really the primary issue
13 because clearly it will be. It has been for every
14 other infringer that sells a lot more products than
15 Lawson, like SAP and Ariba. A lot more of the types
16 of products here. It was an adequate remedy to pay
17 them there, and it's an adequate remedy here going
18 forward.

19 THE COURT: How would I decide that?

20 MR. McDONALD: Well, you'd had a separate
21 hearing. There's some other case law out there that
22 says once we deny the injunction, one judge mentioned
23 I asked the plaintiff do they want to have a royalty.
24 And they said, Well, Judge, we want to wait and see
25 what you do with the injunction. And the Court said,

1 Well, I've denied your request for an injunction. So
2 now you know it's that or nothing. So we'll have
3 briefing on that.

4 THE COURT: Why would anybody ever do that?
5 Why wouldn't I just decide it all at one time?

6 MR. McDONALD: It's the plaintiff's burden to
7 come in and do that. They didn't want to put the
8 evidence in because they didn't want to make that look
9 like an alternative for you, but it is an alternative.
10 Maybe that would have been more efficient, I agree
11 with that, but it's kind of hard for us to respond to
12 something when they didn't put in evidence of what the
13 royalties should be.

14 We can certainly through either a bond or
15 just through the fact that Lawson is solvent represent
16 that one way or the other we can even calculate that
17 after an appeal is over, if need be, and keep track of
18 our sales in the meantime, and we can do it at some
19 later date. We don't have to do it right now.

20 THE COURT: I don't know why I'm even having
21 the hearing today if at some point later they are
22 going to come back and tell me they want a royalty if
23 I don't grant an injunction.

24 MR. McDONALD: Well, I think they want you to
25 give them the injunction and think that you don't have

1 that option, but the fact is you do, and you don't
2 have to find it now. The question is whether there's
3 a remedy that's available to them.

4 And if there is one, and there is, then you
5 don't order the junction. But I don't think you look
6 at it as, well, I have to grant an injunction just
7 because they haven't asked for that alternative remedy
8 that is available. That would be a wrong thing to do.
9 So that's the situation. There's a gateway issue
10 here.

11 On the issue of irreparable harm, ePlus has
12 fashioned this as competition. And, really, this
13 competition that they have we're going to show today
14 through the testimony isn't anything more than *de*
15 *minimis* competition because Lawson and ePlus really
16 sell different products in different ways.

17 Lawson is one of these providers, what they
18 call ERP, enterprise resource planning, vendors that
19 sells a whole suite of products; human resources,
20 accounting or general ledger, and other things as well
21 as procurement. That's like SAP and Oracle and
22 McKesson. These are these people that provide that
23 one stop shopping for businesses so all of their
24 corporate activities can be taken care of.

25 EPlus is not an ERP provider. They are a

1 niche provider of a procurement product. In the
2 industry, they call that best of breed. Some
3 companies do it for procurement. Others do it perhaps
4 for human resources. And it's a whole different world
5 than of competition.

6 In one place that comes into place, for
7 example, is all those companies out there that already
8 have SAP and Oracle and other ERP systems, that's
9 98 percent of the ERP customers out there because
10 Lawson only has actually a little less than 2 percent
11 of all those companies that have that suite of
12 products out there.

13 For those folks that are looking for
14 eProcurement, what we're talking about today, Lawson
15 doesn't even bid for that business because Lawson is
16 not one of these niche players or best of breed with
17 their procurement product. Even if they were invited
18 to compete for that, they wouldn't go for that because
19 that's not what they try to do. That's not their
20 strength. They devote their resources to the full
21 line of products.

22 EPlus, that's right in their sweet spot.
23 That's the sort of customer where they say, Yes, our
24 product is the best of breed that will integrate with
25 your SAP or Oracle system.

1 So when you drill down and really look at the
2 competition here, what's going to become clear is that
3 ePlus has not lost a single sale due to Lawson's RSS
4 or Punchout products. And that's a very, very
5 important issue on whether or not they would be
6 irreparably harmed in a way that cannot be compensated
7 by money.

8 Is there a little bit of competition? There
9 might be literally one or two customers. I don't even
10 know if those are really competition. When you really
11 get down to it, it's a small number because it's the
12 people that are within that 2 percent that have the
13 Lawson ERP suite and now they're looking to add this
14 type of procurement functionality. So you're in a
15 subset of that 2 percent that even would be in that
16 ballpark. So it's very, very rare.

17 The other key things here, that 2 percent
18 number is also significant in another way. Less than
19 2 percent of ePlus' business is this procurement
20 business, this Procure+ and Content+. They call them
21 their flagship products within this niche, but it's an
22 awfully small armada within that company. It's only
23 about \$6 million out of over \$800 million in sales.
24 Lately, it's been less than 1 percent of their sales.
25 So it's very small.

1 So when you're looking at harm and the
2 injunction, there's really no harm to ePlus. With all
3 the other competitors out there, the different
4 products, whether or not Lawson is enjoined isn't
5 going to alleviate any harm to ePlus.

6 THE COURT: Is it your view that I can impose
7 royalties going forward?

8 MR. McDONALD: Yes.

9 THE COURT: And I can hear evidence on that
10 now?

11 MR. McDONALD: Yes.

12 THE COURT: I don't need a jury?

13 MR. McDONALD: That's correct.

14 THE COURT: That's the *Toyota* case?

15 MR. McDONALD: Right.

16 THE COURT: Is that case on appeal?

17 MR. McDONALD: That was the Federal Circuit.

18 THE COURT: I know, but did it go up?

19 MR. McDONALD: I believe it did.

20 THE COURT: Has it been denied writ?

21 MR. McDONALD: Did it go to the Supreme
22 Court, you mean?

23 THE COURT: Yes.

24 MR. McDONALD: I'm pretty confident the
25 Supreme Court hasn't accepted anything. I don't know

1 whether it was petitioned for cert or not.

2 THE COURT: The issue is whether it's
3 pending. I don't know of anything being granted.

4 MR. McDONALD: I think the time has passed
5 for that, Your Honor, just looking at the district
6 court decision back in 2006, but I'm not sure.

7 THE COURT: Oh, yeah.

8 MR. McDONALD: So on the harm issue, I'm not
9 clear what exactly ePlus is asking for in terms of a
10 scope of injunction. I didn't hear Mr. Robertson talk
11 about that in his opening remarks, but we have seen
12 some indication in their papers they're seeking an
13 injunction not just in going forward RSS and Punchout
14 sales by Lawson, which is one thing for customers that
15 aren't in the pipeline, etc., but they actually have
16 indicated that while they want to let our existing
17 customers continue to use RSS and Punchout -- Your
18 Honor asked that question to Mr. Robertson at one of
19 our hearings, I think, between trial and now, and he
20 said, oh, no, we're not seeking to stop the customers
21 from using it, but they are seeking to have Lawson
22 stop servicing those customers. And that would be
23 very harmful.

24 Lawson's life would go on at some level for
25 Lawson, but we're really talking about there is a harm

1 for the customers because they cannot use unsupported
2 software, especially industries like health care and
3 the public sector. We're talking about buying the
4 supplies for people's operations. And if they have an
5 unsupported system, they have a problem with it, it is
6 actually -- for example, Google makes a change to
7 their system. Well, if the product interfaces with
8 Google, there might be a little glitch or something.
9 The customer needs to pick up the phone and call
10 Lawson and fix that.

11 It's like saying you can keep driving the
12 car, but you just can't put anymore gas in it because
13 the support is so critical to using these things.
14 We're talking about people having operations. We're
15 talking about Virginia Commonwealth university, which
16 is a Lawson customer of RSS.

17 If you enjoin Lawson from supporting them,
18 they don't have any other options. No other company
19 out there supports Lawson's systems. You have to have
20 a knowledge and understanding and access to the code
21 of the Lawson systems to be able to fix those types of
22 glitches and figure out how it interacts with the
23 other Lawson systems in that suite of products to
24 solve those problems.

25 So you're talking about a very significant

1 harm. They can't simply just stop using our product
2 and switch to another one tomorrow. That takes
3 months, even years, to qualify the products to make
4 sure they work so they don't cause products with
5 supplying operations and things like that. It
6 literally takes years for a customer to switch to a
7 different product. So that would be a devastating
8 thing.

9 And ePlus has nothing to gain from that.
10 They don't provide service to the Lawson customers.
11 We're talking about an injunction here that would
12 really just hurt customers without helping ePlus. The
13 right thing to do would be to just -- we would keep
14 track of our sales. Everybody can take their appeals.

15 The only way to make sure that nobody is
16 irreparably harms here is to deny an injunction,
17 because those customers, there's no way to compensate
18 them if they are lost from support and ePlus loses on
19 appeal. What recourse do they have at that point? So
20 that's the right thing to do here when you look at the
21 balance of the harms.

22 So that in a nutshell -- Mr. Hager is our
23 person. He's the VP from the S3 part of Lawson, which
24 has these RSS and Punchout products, very
25 knowledgeable about many aspects of the company

1 because he's held different jobs within S3. And he'll
2 help you understand the competitive landscape out
3 there, what we really sell, how it's sold, and also
4 this impact on customers if an injunction is entered.

5 Thank you.

6 Oh, we have a cite for the Federal Circuit
7 decision in *Pace v. Toyota*. It's 504 F.3d 1293.
8 That's from 2007. And somebody just checked that cert
9 was denied.

10 Thank you.

11 MR. ROBERTSON: If I might briefly respond.

12 THE COURT: I don't want you to do anything
13 except tell me one thing.

14 MR. ROBERTSON: Yes, sir.

15 THE COURT: If you are denied an injunction,
16 am I going to be facing a request for going forward
17 royalty?

18 MR. ROBERTSON: Sir --

19 THE COURT: Assume you're going to be denied
20 an injunction today after I hear the evidence and tell
21 you I don't think there's any reason for an
22 injunction, are you going to be asking for going
23 forward royalty?

24 MR. ROBERTSON: I think the Court has the
25 authority to do it.

1 THE COURT: I didn't ask you that.

2 MR. ROBERTSON: I'm not going to ask for that
3 relief, Your Honor. We want --

4 THE COURT: Ever?

5 MR. ROBERTSON: Excuse me?

6 THE COURT: Are you ever going to come to me
7 and ask for that relief?

8 MR. ROBERTSON: This is what we want.

9 THE COURT: E-v-e-r, Mr. Robertson?

10 MR. ROBERTSON: I am not going to ask you for
11 that relief, Your Honor, because I want an injunction,
12 and once the injunction enters, if my client so
13 decides that it wants to determine to license Lawson,
14 that's when the playing field has been leveled.

15 In fact, Judge Ellis wrote a very thoughtful
16 decision on this very point saying that it is
17 difficult for courts who are ill-equipped to determine
18 what the appropriate licensing terms should be between
19 these two parties. The Court is not an expert in the
20 software industry, with all due respect. And as Judge
21 Ellis pointed out, once the injunction enters, it is
22 indeed the marketplace that sets the terms for the
23 license that could issue going forward.

24 In other words, Lawson would have to sit down
25 with ePlus and determine, based on marketplace

1 factors, how valuable the technology is that is
2 infringing.

3 THE COURT: The answer is no, you're not
4 going to come to me for royalty going forward if the
5 injunction is denied?

6 MR. ROBERTSON: I suppose if the injunction
7 is denied and the Federal Circuit then upholds the
8 denial of the injunction, it would probably be
9 remanded for some relief because, as the Court knows,
10 the statute says a licensee, excuse me, I mean a
11 patent owner shall receive no less than a reasonable
12 royalty.

13 So I think they would remand indicating that
14 since there was no injunction granted, that there had
15 to be some relief afforded by the district court.

16 I wanted to point out something about the
17 *Toyota v. Pace* case if I could. It's a very unique
18 case. In fact, that's a case where the Court did
19 impose a compulsory license, but it turned on the fact
20 that the patent owner was an NPE, didn't have its own
21 product, wasn't out there competing in the
22 marketplace, didn't have a product covered by the
23 patents. And that is why and that was the only reason
24 why.

25 THE COURT: Tell the record what an NPE is.

1 MR. ROBERTSON: That's the non-practicing
2 entity, sometimes referred to, as mentioned before,
3 the patent troll.

4 THE COURT: What if I decided that the public
5 interest here requires a compulsory license because
6 when one of my colleagues goes to the Medical College
7 of Virginia for open heart surgery, I can't be putting
8 him or any other member of the public, colleague or
9 not, Mr. Merritt, Mr. Carr, or anybody in his firm,
10 anybody in the Richmond area, at risk of losing a
11 stitch or two, or not having the right syringe, or not
12 having the right product. So instead of an
13 injunction, I say you're entitled to a remedy, and
14 under the circumstances an injunction is not the right
15 one, but a compulsory license is.

16 At that juncture I'd have to find out what
17 the license is or rate is, wouldn't I?

18 MR. ROBERTSON: You would probably need to
19 make findings of fact with respect to what a
20 reasonable royalty would be.

21 THE COURT: How would I do that on the record
22 that would be before me at the conclusion of these
23 proceedings?

24 MR. ROBERTSON: I think it would be very
25 difficult, Your Honor.

1 THE COURT: It would be somewhat difficult
2 unless one accepts Ouija work, dart boards, and those
3 kinds of things as the bases for deciding evidence.

4 MR. ROBERTSON: One of the things that the
5 Court suggested earlier was that we should be looking
6 at comparable licenses. Of course, we did that when
7 we went out in preparing our damages model for the
8 Court, and we didn't find comparable licenses.

9 The Federal Circuit has been very particular
10 in what it has determined to be comparable licenses in
11 the same technology. I don't want to relive that, the
12 argument with respect to ResQNet, but one of the
13 reasons they say to look to the settlement agreements
14 was they were the most pertinent because they
15 addressed the very patents that were at issue in the
16 case.

17 I looked at some of the other comparable
18 licensing. In fact, it involved some of my clients,
19 licenses I knew that the clients had never received a
20 penny in royalties under, notwithstanding what the
21 terms were. I looked at the technology that was
22 identified.

23 So we had a handful, maybe five, that we
24 thought were comparable or could be considered
25 comparable and determined that they all were not

1 because they did not involve the same technology or
2 they were not really arms' length negotiated
3 comparable licenses.

4 So I think it's going to be very difficult
5 for the Court to try and come up with a royalty rate
6 given the sort of absence of examples out there for
7 the Court to draw upon.

8 Lawson has offered in its own self-serving
9 way. It wants to dictate what the terms of the
10 licensing are.

11 THE COURT: They said what?

12 MR. ROBERTSON: They said first it should
13 only be on the revenues they generate from licensing
14 fees. Why is that? Because it's a very small portion
15 of revenues they generate from --

16 THE COURT: Mr. McDonald can't argue that
17 anymore after what he just argued about the critical
18 nature of the service aspect of their business. He
19 just said that's the integral link, the thing that
20 keeps things going, the thing that creates such a
21 significant interest in the public that an injunction
22 couldn't possibly lie.

23 And if that's the effect of it there,
24 certainly it has another effect in the dollar arena,
25 doesn't it?

1 MR. ROBERTSON: Certainly, Your Honor, I
2 think Mr. McDonald has overstated the harm.

3 THE COURT: He's bound by it now having
4 stated it.

5 MR. ROBERTSON: First let me say, as a matter
6 of law, Your Honor, let me cite this case to you.
7 It's *Acumed v. Stryker Corporation*. It's 551 F.3d
8 1323. It's a 2008 case. It says, in considering the
9 balance of the hardships in an injunction
10 determination, you only consider the hardships between
11 the patent owner and the infringer. The effect on a
12 customer's -- and in this case, it was a medical case
13 -- patients is irrelevant under this prong.

14 There have been a number of cases actually
15 involving medical devices where injunctions have
16 entered.

17 THE COURT: Is that before or after eBay?

18 MR. ROBERTSON: It's a 2008 case.

19 THE COURT: I have to read that case because
20 it sounds to me like -- I think I've looked at it, but
21 I think it's rather remarkable to say that you don't
22 pay any attention to the public interest. Here you're
23 not talking about the customers, you're talking about
24 the patients in the hospital who aren't the customers
25 at all.

1 And it seems to me that you have to pay
2 attention to the public interest under eBay, I don't
3 care what anybody else says. And, in fact, what eBay
4 actually said to the patent bar and to the Federal
5 Circuit is the law has been the same for hundreds of
6 years in respect of giving injunctions, and you must
7 pay attention to it in the patent field. There is no
8 such think as the eBay factors. Those factors were
9 decided at common law so far back that your degree
10 even picks them up, and so does mine, because that's
11 what we were taught. And one of the components of
12 that degree is the public interest.

13 So if you're suggesting that you don't
14 consider the public interest, and that's the meaning
15 of *Stryker*, I can't accept that in view of what eBay,
16 the fundamental message that eBay says, which is
17 patent lawyers, Federal Circuit, you're in the same
18 system of justice that all the rest of us in this
19 country are in. We ordered our lives by certain
20 precepts, and you're bound by it. Now get with it and
21 apply those rules.

22 That's what the Supreme Court told everybody
23 in the patent bar and they told the Federal Circuit
24 the same thing. And they told every district judge
25 the same thing. Go back and look at what the law is

1 about granting junctions and do what we've been saying
2 you're supposed to do for a couple hundred years.

3 MR. ROBERTSON: Your Honor, we didn't argue
4 anything differently as the respondent in that case
5 that went out there and said the traditional four
6 factors need to be applied.

7 Justice Roberts said they should be applied,
8 too, but for hundreds of years when they have been
9 applied, historically injunctions have been granted.

10 So certainly we need to consider the public
11 interest here. Let me again say I think it's been
12 overstated somewhat because Lawson already has
13 provided indemnifications to every single one of their
14 customers with respect to this software if it is found
15 to infringe.

16 And they need to do three things. They need
17 to either modify it at their expense so it doesn't
18 infringe. They need to reimburse the customers for
19 the cost of the license. Or they need to go and seek
20 a license from ePlus. That's the indemnification,
21 that is the bargain they made with their
22 customers when --

23 THE COURT: That'll all be dealt with in the
24 briefing, I suppose. We're getting ahead of
25 ourselves.

1 MR. ROBERTSON: It will be.

2 Having said that, I do have copies of the
3 *Acumed v. Stryker* case I just cited, Your Honor, that
4 I can hand up.

5 THE COURT: Thank you.

6 MR. ROBERTSON: I call Mr. Farber to the
7 stand.

8
9 KENNETH FARBER, called by the Plaintiff, first
10 being duly sworn, testified as follows:

11

12 DIRECT EXAMINATION

13 BY MR. ROBERTSON:

14 Q Mr. Farber, just please state your name for the
15 record.

16 A Kenneth Farber.

17 Q You are the president of ePlus Systems, Inc.,
18 correct?

19 A Yes.

20 Q The two products we've been talking about that
21 ePlus offers for sale that concern the patents-in-suit
22 are Procure+ and ePlus Content+; is that right?

23 A Yes.

24 Q Are those the primary software products developed
25 and sold by ePlus Systems and ePlus Content Services?

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1 A Yes.

2 Q I want to ask you some additional detail about
3 those products. I know you went into it briefly at
4 trial, but if we could, let's talk about it in terms
5 of just the functionality of that software, if we
6 could.

7 Do you understand that the products that we're
8 talking about here practice the claims of the
9 patents-in-suit?

10 A Yes.

11 MR. McDONALD: Objection, Your Honor. Lack
12 of foundation as to this witness' knowledge of the
13 scope of the claims.

14 THE COURT: Overruled.

15 Q Can you tell us if you have familiarity with that,
16 sir?

17 A Yes.

18 Q Okay. What is it?

19 A Well, my familiarity of what the systems do, my
20 understanding and knowledge of the systems is because
21 I oversee the development of those systems, and I
22 understand through the various court cases that I've
23 been through and the reviews and evaluations of each
24 claim and the many, many times that --

25 Q So at a high level, can you describe the

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1 functionality of those products that you offer on the
2 marketplace?

3 A Sure. The products that we offer for Procure+ and
4 Content+ functionally they provide the ability to
5 allow customers or end users to electronically procure
6 goods or products and services. It allows them to
7 select and search multiple catalogs. It allows them
8 to create requisitions, to create purchase orders, to
9 check inventory, to gain approval for those purchases,
10 and be able to combine purchase orders on multiple
11 purchases from a single requisition at a high level.

12 Q Can you do what's known as comparison shopping or
13 cross-referencing to determine whether one product is
14 similar or generally equivalent to another?

15 A Yes, you can.

16 Q I'm going to ask you to take a look. I think you
17 have your book in front of you. It's Exhibit 448 in
18 there. What is this, sir?

19 A It's a product description of Procure+ 6.8.

20 Q Let's go to page 2 of the document that ends with
21 the Bates label 3127. What's being depicted by the
22 illustration at the top right-hand corner?

23 A It's a very high level description of the
24 functions that are performed by the Procure+ solution.

25 Q So you have catalogs and requisitions and ordering

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1 and approvals we've all talked about?

2 A Right.

3 Q As well as inventory management?

4 A Correct.

5 Q So does the Procure+ allow users to select items
6 from catalogs for the requisition and services?

7 A Yes, it does.

8 Q On the right-hand side of the page, there's a
9 section called "creating a requisition." Do you see
10 that?

11 A Yes.

12 Q What is this describing here?

13 A There are a number of different ways that
14 requisitions can be created in the system, and this is
15 a description, a very high level of the different ways
16 that a requisition can be created through either
17 searching or hot lists or what we call quick reqs or
18 service templates, etc.

19 Q On this page is also a discussion about punching
20 out to external catalogs. Do you see that?

21 A Let's see.

22 Q The next page. I'm sorry.

23 A On page 2? Which page are you referring to?

24 Q Does the Procure+ solution and Content+ permit you
25 to what's known as Punchout to external catalogs?

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1 A Yes.

2 Q Just briefly refresh the Court on what this
3 Punchout capability is.

4 A Sure. From within the control of the Procure+
5 application Punchout allows you to go to a third
6 party's catalog, purchase goods or services from that
7 catalog, and then bring that information back into the
8 control of the procurement application.

9 Q You were present during the trial of this case as
10 the corporate representative for ePlus, correct?

11 THE COURT: Where is that referred to in this
12 exhibit? What page, Mr. Farber?

13 MR. ROBERTSON: It's on page 3, I believe,
14 Your Honor. It's now on the screen there. It has a
15 Bates label of 3128, I believe.

16 THE COURT: Okay. All right.

17 BY MR. ROBERTSON:

18 Q I'm sorry. You were present as the corporate
19 representative for ePlus, right?

20 A Yes, I was.

21 Q During the testimony from Lawson's witnesses, did
22 they discuss the same Punchout capability?

23 A Yes, they did.

24 Q This Punchout term, is that an industry term?

25 A Yes, it is an industry term.

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1 Q Do a number of the competitors in this
2 eProcurement space have that capability?

3 A Yes.

4 Q You have licensed Ariba and SAP, for example. Do
5 they have that capability?

6 A Yes, they do.

7 Q Is that capability pretty standardized now for
8 somebody to be competitive in this marketplace?

9 A Yes, it is.

10 Q You mentioned about searching the multiple
11 catalogs and selecting items, building requisitions,
12 and generating multiple purchase orders from a single
13 requisition, checking inventory, and
14 cross-referencing. Again, you were present during the
15 trial when all those functionalities were discussed by
16 Lawson's witnesses as their S3 procurement suite
17 having those capabilities; is that right?

18 A Yes, that's correct.

19 Q Why don't we take a brief look at Plaintiff's
20 Exhibit 307, if we could.

21 A I'm sorry. Which one?

22 Q 307.

23 THE COURT: Which book is it in?

24 MR. ROBERTSON: Should be in the book that
25 indicates Mr. Farber's witness binder.

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1 THE COURT: I or II?

2 MR. ROBERTSON: Volume II, Your Honor.

3 Sorry.

4 Excuse me, Your Honor. It's Volume I. I
5 only have one volume.

6 BY MR. ROBERTSON:

7 Q Do you recognize this document, sir?

8 A Yes, I do.

9 Q What is it?

10 A This is an ePlus procurement brochure.

11 Q Does it provide an overview of the advantages
12 customers can realize from the ePlus procure product?

13 A Yes.

14 Q I want you to take a look at page 3 that ends with
15 the Bates label 9162.

16 A Okay.

17 Q What's being shown here?

18 A This is a description at a very high level again
19 of the benefits that's provided by the Procure+
20 solution.

21 Q It's identifies the electronic catalogs?

22 A Yes, the catalogs, the auto PO generation.

23 Q Requisitions?

24 A Yes.

25 Q Inventory management?

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1 A Yes.

2 THE COURT: What's the difference between
3 ePlus, eProcurement and Procure+? You earlier
4 discussed Procure+ and Content+ unless I misunderstand
5 you. Is eProcurement Content+?

6 THE WITNESS: Yes. This is just a high level
7 brochure that encompasses the product level
8 functionality of Procure+ and Content+, Your Honor.

9 MR. ROBERTSON: EProcurement, Your Honor, if
10 I might, is just sort of an industry term that
11 summarizes the general capability of these types of
12 products. The brand for ePlus is Procure+ and
13 Content+.

14 Q Can you tell the Court what the difference is
15 between Procure+ and Content+ and what the different
16 functionalities they each provide?

17 A Well, the Procure+ solution is the component that
18 provides the actual purchasing mechanisms, the
19 requisitions, the inventory management, the work flow,
20 etc., the auto PO generation.

21 The Content+ solution is the element of the
22 solution that provides the electronic catalogs.

23 Q Provides the actual catalog content?

24 A That's correct.

25 Q I want you to take a look at Plaintiff's Exhibit

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1 287 that's in your book.

2 A Okay.

3 Q Do you recognize this document?

4 A Yes.

5 Q What is it?

6 A This is a white paper describing Content+.

7 Q Why don't you turn to page 9 of the document which
8 ends with the Bates label 7396.

9 A 96? All right. That's page 8, right?

10 Q I'm sorry. There's a heading at the top of this
11 page say that says content management from ePlus
12 introducing Content+?

13 A Yes.

14 Q What is this describing?

15 A Well, again, it's describing the high level
16 functionality of the solution and the components that
17 we call enabler, the manager, and the syndicator
18 functions of the system.

19 Q Does the enabler function allow users to import
20 catalog content?

21 A Yes, it does.

22 Q Into their databases?

23 A Yes.

24 Q Does it permit you to validate and transform that
25 data if necessary?

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1 A Yes, it does.

2 Q Does it allows users to categorize catalog content
3 by schemas and classifications and various attributes?

4 A It does.

5 Q And you were present during the trial when
6 Lawson's witnesses testified as to the functionality
7 of their S3 product with respect to that same sort of
8 transformation, validation, and classification by
9 schemas including the UNSPC; is that correct?

10 A That's correct.

11 Q So does Content+ then enable users to take catalog
12 items and associate them with a classification schema
13 such as the UNSPC in order to do the cross-referencing
14 to determine whether the products are similar or
15 generally equivalent?

16 A Yes, it does.

17 Q Does the enabler, manager and syndicator
18 functionality of Content+ also allow users to upload
19 supplier catalogs or transfer catalog data from legacy
20 systems?

21 A Yes.

22 Q Were you present during the trial when Lawson's
23 employees testified that they had that same
24 capability?

25 A Yes, I was.

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1 Q So together the Procure+ and Content+ provide the
2 capability to store vendor catalog data in a database?

3 A Correct.

4 Q Can this vendor catalog data be comprised in
5 multiple product catalogs?

6 A Yes.

7 Q How many?

8 A It's limitless.

9 Q Can Procure+ provide the capability to search
10 those catalogs?

11 A Yes, it does.

12 Q Can you search portions of the database separately
13 using the Procure+ in an electronic sourcing system?

14 A Yes, you can.

15 Q Does the Procure+ and Content+ functionality
16 enable those users to select the search results and
17 add them to a shopping cart?

18 A Yes.

19 Q Were you present during the trial when Lawson
20 employees testified as to that same functionality?

21 A Yes.

22 Q Let's just briefly go into some of the history
23 between about the ProcureNet acquisition. That was
24 the acquisition back in 2001 when ePlus purchased the
25 company that had the patents as well as the

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1 operational software; is that right?

2 A That's correct.

3 Q At the time were you aware of the purpose behind
4 ePlus' acquisition of ProcureNet?

5 A Of ePlus' purposes? I wasn't employed by ePlus.
6 I was employed by ProcureNet, so I don't know all the
7 motivations that they might have had.

8 Q Have you come to learn what those motivations
9 were?

10 A Some of them.

11 Q What were they?

12 A I know that ePlus was very interested in having
13 their own intellectual property. They had licensed
14 something else from somebody or had some solution that
15 provided some functionality.

16 MR. McDONALD: I object. I think he's
17 testifying as to what other people told him at this
18 point. I don't think there's foundation laid. I
19 think there's lack of foundation and probably hearsay.

20 MR. ROBERTSON: Let me see if I can rephrase
21 it.

22 Q Subsequently, in the course of your
23 responsibilities as the president of ePlus Systems,
24 have you come to learn the value of the products to
25 ePlus and the purpose they are being employed by?

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1 A Yes.

2 MR. ROBERTSON: I understand Your Honor has a
3 call.

4 THE COURT: I have a short conference call.
5 I'll be right back. If you will just stay there
6 unless you need to take a recess. If you do, you can
7 take a short recess.

8 (Brief recess taken.)

9 (Transcript resumes on page 44.)

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